

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**APPLE AMERICAN GROUP LLC APPLEBEES,  
d/b/a APPLEBEES NEIGHBORHOOD GRILL AND BAR**

**and**

**Case No. 18-CA-103319**

**COLE S. ESSLING, An Individual**

*Tyler Wiese, Esq.*, Counsel for the General Counsel.

*Melissa Griffin, Esq.*, *Apple American Group LLC*, Counsel for the Respondent.

**DECISION**

**Statement of the Case**

**Joel P. Biblowitz, Administrative Law Judge:** The parties herein waived a hearing and submitted this case directly to me by way of a Joint Motion and Stipulation of Facts dated August 20, 2013. The Complaint herein, which issued on July 19, 2013<sup>1</sup>, and was based upon an unfair labor practice charge that was filed on April 22 by Cole S. Essling, an Individual, alleges that since March 7, Apple American Group LLC- Applebees d/b/a Applebees Neighborhood Grill and Bar, herein called Respondent, issued, promulgated and maintained an employee handbook rule containing a mandatory arbitration clause that would reasonably be understood by employees to prohibit them from filing collective or class-wide legal actions against the Respondent in any forum, whether legal or arbitral, in violation of Section 8(a)(1) of the Act.

The Joint Motion and Stipulation of Facts provides as follows:

1. The Charge in this proceeding was filed by the Charging Party on April 22, 2013, and a copy was served by regular mail on Respondent on about that same date. Respondent acknowledges receipt of the charge.
2. On July 19, 2013, the Acting Regional Director for Region Eighteen of the National Labor Relations Board issued a Complaint in this proceeding alleging Respondent violated the National Labor Relations Act ("Act"). Respondent and the Charging Party each acknowledge receipt of a copy of the Complaint, which was served on both by mail on that same date.
3. Respondent filed an Answer to Complaint on July 31, 2013. The Acting General Counsel and the Charging Party each acknowledge receipt of a copy of the Answer, which was served on both by mail on that same date.

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<sup>1</sup>Unless indicated otherwise, all dates referred to herein relate to the year 2013.

4.(a) At all material times, Respondent, a Delaware corporation with facilities throughout the United States, including a facility in St. Paul, Minnesota, has been engaged in the operation of  
5 public restaurants selling food and beverages throughout the country.

(b) In conducting its operations described above in subparagraph (a) during the calendar year ending December 31, 2012, Respondent derived gross revenues in excess of \$500,000.  
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(c) In conducting its operations described above in subparagraph (a) during the calendar year ending December 31, 2012, Respondent purchased and received at its St. Paul, Minnesota facility goods and services valued in excess of \$50,000 from entities located outside the State of Minnesota.  
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(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.  
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5. Respondent operates approximately 440 Applebee's restaurants across 23 states.  
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6. During the last six months, Respondent has maintained an employee handbook containing a mandatory dispute resolution procedure. This employee handbook was distributed to employees at all restaurants operated by Respondent, including its facility located at 1018 Meadowlands Drive in St. Paul, Minnesota.  
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7. The mandatory dispute resolution procedure consists of two documents: "Receipt of Dispute Resolution and Agreement to Abide by Dispute Resolution Program" ("Receipt") and "Dispute Resolution Program."  
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8. Since this dispute resolution procedure was introduced, employees have been required to sign the "Receipt of Dispute Resolution and Agreement to Abide by Dispute Resolution Program." Both the Receipt and the Dispute Resolution Program constitute terms and conditions of employment for employees.  
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9. Since 2008, four complaints have been filed against Apple American Group LLC and its subsidiaries on behalf of classes of employees alleging employment-related violations of various state and federal statutes. In each instance, the Respondent has asserted the existence of class and collective action waivers in the "Receipt of Dispute Resolution and Agreement to Abide by Dispute Resolution Program" and "Dispute Resolution Program" as a defense to the class action complaints. In two of those cases, the forum court has denied Respondent's motions to compel individual arbitration. In one other action for violations of the Fair Labor Standards Act, the parties settled before a ruling was issued. In the fourth case, also alleging violations of the Fair Labor Standards Act, the Respondent has not yet been served.  
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10. Charging Party Cole S. Essling has not expressed any intention to file, nor has he actually filed, any collective, representative or class action claims against Respondent.  
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11. The issues presented in this matter are:

(a). Whether Respondent's mandatory dispute resolution policy would reasonably be read by employees as prohibiting them from bringing class or collective claims in any forum, whether legal or arbitral, against Respondent.

(b). Whether Respondent has interfered with, coerced, or restrained its employees' exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, by maintaining its mandatory dispute resolution policy.

The Joint Motion further provides that Counsel for the General Counsel's and the Respondent's Statements of Position are attached thereto, and that the Stipulation is made without prejudice to any objection that any party may have as to the relevancy of any of the facts therein.

Respondent's Dispute Resolution Program states as follows:

This Dispute Resolution Program is adopted for Apple American Group (Apple American Group LLC and Apple American Group II LLC) and all subsidiaries or affiliated entities, and all successors and assigns of any of them, all of which are collectively hereinafter referred to as the "Company."

The Company is committed to building a strong relationship between the Company and all of our employees – a relationship that is based on trust and open communication. The Company is an equal opportunity employer and strives to maintain an atmosphere of mutual trust and open, honest communication. By working together, we can reach any goal we set for ourselves. We do not and will not tolerate harassment or discrimination by any employee, regardless of their status with the Company, and no employee will be retaliated against for using this Program.

We understand, however, that problems and disagreements are unavoidable when people with different viewpoints spend a lot of time together. We cannot entirely eliminate disagreements, but we can provide a process for resolving them when they do occur by taking prompt constructive action.

Based on these beliefs and values, we developed this DISPUTE RESOLUTION PROGRAM (the "Program"). The Program is a four- step process for resolving workplace problems quickly and fairly. This policy describes the steps that both you and the Company must take to resolve many types of workplace problems. The Company is also obligated to follow the Program and will also be bound by arbitration. The types of problems covered by the Program are explained in detail in this policy.

THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH DISPUTES BETWEEN YOU AND THE COMPANY MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.

When you have a work-related problem, follow the steps listed below in this policy.

**Step 1: UTILIZE THE OPEN DOOR POLICY**

In any relationship, when a disagreement occurs, keeping emotions bottled up inside only causes the problem to get bigger. At the Company we want to encourage open communication so we can solve the problem with the least amount of stress for those involved. To do this, we have developed an Open-Door Policy that encourages you to

talk with your manager to get your concerns addressed quickly.

**1. Talk directly to your immediate manager.** If you have a problem, first discuss it with your Manager or General Manager as soon as possible after the problem arises.

**2. Talk to a higher level of management.** Sometimes, you may not be able to resolve the issue with your Manager or General Manager. If this is the case, take your concern to your Area Director, Director of Operations or up to the Market President to get the answers you need.

**3. Talk with Human Resources.** If you have tried the above steps and are not satisfied, or if you are not comfortable talking to your managers for any reason, you can contact your Human Resources Generalist to get the help you need.

**4. Talk with Support Center.** If for any reason you are uncomfortable with following the prior steps, you should feel free to contact the Support Center Human Resource Dept. at 216.525.2775 or Employee Hotline at 800.837.3667 x1300 and ask for help.

## **Step 2: EXECUTIVE REVIEW**

If you have tried the Open Door Policy and are not satisfied, you may request the Executive Review Step. In this step, the Company's President or his designee (the "Executive") will review the issue or problem and attempt to resolve the issue or problem to your satisfaction and to the satisfaction of your Manager and the Company. Failing that, the Executive will make a decision.

Here is how you obtain access to the Executive Review Step:

**1. Request review.** As soon as possible after your exhaustion of the Open Door Policy Step process, you can start the Executive Review process by contacting the Company's Employee Relations department. The Employee Relations department can be reached at 216.525.2775 or you can call the Employee Hotline at 800.837.3667 x1300 and ask for help.

**2. Submit information.** In order to access the Executive Review Step, you should provide a written statement that contains as much of the following information as is reasonably available to you:

a. Describe in detail, to the best of your ability, the factual basis on which your claim is made.

b. Describe the measures you have taken at the Communication Step to resolve the issue including the supervisors you have spoken with about the problem.

c. Describe the nature and extent of any remedy or relief you believe you should have. You can obtain a copy of a form to use for this purpose from the Human Resources Department.

**3. The Review.** The Company's Executive will review the problem and make whatever investigation he believes is appropriate under the circumstances. This may include, in all likelihood, a discussion with you and your Manager and a review of all relevant documents.

**4. The Solution.** The Executive will attempt to find a way to resolve the problem to the satisfaction of all the parties involved in the situation. However, if the problem cannot be resolved in this manner, the Executive will make a decision. That decision will be made in writing, generally within thirty (30) days of your request for executive review.

**5. Non-Legal Claims.** If your claim is not a statutory or common law claim ("legal claim"), Executive Review is the final step in the Dispute Resolution Program. (Only legal claims may proceed to mediation or arbitration). For example, mediation and arbitration are not available to review performance evaluations, job elimination or lay-off decisions, Company work rules, policies and pay rates, or increases or decreases in benefits, except to the extent such matters relate to statutory or common law claims.

**Step 3: MEDIATION**

If you believe you have a legal claim that was not solved through the Open Door Policy or Executive Review, the next step is Mediation. In Mediation, an objective, independent third party tries to help the parties reach a mutually agreeable solution.

When you or the Company requests Mediation, the Company will contact the American Arbitration Association (AAA) or a similar organization specializing in dispute resolution. The agency will assign a professional mediator to mediate the dispute. The mediator will listen, work to open communication lines, and offer creative solutions. But the mediator does not make a final decision. It is up to you and the Company to reach agreement. The goal of mediation is to develop a solution that satisfies both parties involved.

Here is how to put the Mediation Step to work for you:

**1. Advise the Employee Relations department that you request Mediation.** You should request Mediation as soon as possible, generally within sixty (60) days from the date you complete the Executive Review Step, so that the issues will be fresh in your mind. You will be requested to complete a Request for Mediation form, which will be furnished.

**2. Select mediator.** When either you or the Company request Mediation, the parties will select an outside, independent neutral mediator to handle the mediation process. The Company will pay the fees of the mediator and the mediation agency.

**3. You, the mediator and the Company representative meet.** The mediator will schedule a meeting between you and the Company representative. The mediator will guide the discussion and help resolve the problem. However, it is up to both you and the Company to reach agreement. The mediator does not make the final decision.

**4. Written agreement.** If appropriate, after you and the Company have agreed upon a solution, a written agreement will be signed by the parties.

**Step 4: ARBITRATION**

If you have a work-related problem that involves one of your legally protected rights, which has not been resolved through the earlier steps, you may request Arbitration.

In Arbitration, an outside neutral expert chosen and agreed upon by you and the Company, called an "arbitrator", becomes involved in the resolution process. He or she listens to the facts, then makes a final binding decision and awards any damages, just like a judge in a court of law. Arbitration is less formal than conventional court litigation but is clearly established and governed by rules and standards of conduct, which are designed to assure due process of law is fully protected. The goal of Arbitration is to provide effective and efficient problem resolution.

Here is how the Arbitration process works:

**1. Request Arbitration.** If you believe you have a legal claim, you may request that your claim go to Arbitration. Simply complete an Arbitration Request Form (provided upon request) and return it to the Company at its Cleveland, Ohio Support Center addressed to the attention of the Apple American Group Employee Relation Department, 6200 Oak Tree Blvd, Suite 250, Independence, Ohio 44131. The form can be obtained from your Human Resources Generalist. The Arbitration will be conducted by the AAA or any similar organization mutually acceptable to you and the Company. The arbitration will be

conducted under the AAA's "National Rules for the Resolution of Employment Disputes", which are in effect at the time the demand for arbitration is filed. The rules can be obtained from the AAA's website at ADR.org or from the Company upon request.

The arbitration agency selected (the "agency") will then bill you and the Company each a filing fee. Your portion of that fee is limited to \$125.00. The Company will pay the balance of the agency's initial filing fee and will pay the arbitrator's fee. If you establish that you cannot pay the filing fee, the Company will pay your portion of the fee.

**2. A hearing is set.** The arbitrator will schedule a date, time and place for a hearing. During this hearing, both you and the Company present the pertinent facts, documents, and witnesses. You may hire a lawyer to participate in the Arbitration hearing with you. The hearing will be conducted in the community where you are/were employed by the Company or in another mutually agreeable location.

**3. A decision is made.** Based on the information presented and the facts gathered, the arbitrator will make a final binding decision in writing that will set forth the essential findings and conclusions on which the award is based. The decision of arbitrator shall have a final and binding effect in any related litigation. If you win, the arbitrator can award you anything you might seek through a court of law. By using Arbitration, your rights are protected and damages can be paid if those rights have been violated.

#### **PROGRAM RULES CLAIMS SUBJECT TO ARBITRATION**

Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company or against its officers, directors, shareholders, employees or agents, including claims related to any Company employee benefit program or against its fiduciaries or administrators (in their personal or official capacity), and all claims that the Company may now or in the future have against you, whether or not arising out of your employment or termination, except as expressly excluded under the "Claims Not Subject to Arbitration" section.

Legal claims that are subject to arbitration include, but are not limited to:

- \* claims for wages or other compensation;
- \* claims for breach of any contract, covenant or warranty (expressed or implied);
- \* tort claims (including, but not limited to, claims for physical, mental or psychological injury, but excluding statutory workers compensation claims);
- \* claims for wrongful termination;
- \* claims for sexual or other illegal harassment or discrimination (including, but not limited to, claims based on race, sex, sexual orientation, religion, national origin, age, medical condition or disability whether under federal, state or local law);
- \* claims for benefits or claims for damages or other remedies under any employee benefit program sponsored by the Company (after exhausting administrative remedies under the terms of such plans);
- \* "whistleblower" claims under any federal, state or other governmental law, statute, regulation or ordinance;
- \* claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance; and
- \* claims for retaliation under any law, statute, regulation or ordinance.

#### **CLAIMS NOT SUBJECT TO ARBITRATION**

The only claims or disputes not subject to arbitration are as follows:

- \* any claim by an employee for benefits under a plan or program which provides its own binding arbitration procedure;
- \* any statutory workers compensation claim; and
- \* unemployment insurance claims;

Your agreement to adhere to this Dispute Resolution Program does not prohibit you from pursuing an administrative claim with the National Labor Relations Board, any state or federal department of labor or the United States Equal Employment Opportunity Commission. This Agreement, does, however, preclude you from personally pursuing court action regarding any such claim.

Additionally, nothing in this Agreement is intended to prevent either you or the Company from obtaining injunctive relief in court to prevent irreparable harm pending the conclusion of any arbitration conducted hereunder and either of us may apply to the appropriate state or federal court for a temporary restraining order, preliminary injunction, or other interim or conservatory relief, as necessary, without breach of this arbitration agreement and without abridgement of the powers of the arbitrator.

The parties also agree that any arbitration between the employee and the Company is of their individual claim and that any claim subject to arbitration will not be arbitrated on a collective or class-wide basis. However, this provision does not preclude employees from exercising their rights under the National Labor Relations Act to joining other employees in a collective action to improve working conditions.

Also, any non-legal dispute is not subject to arbitration. Examples include disputes over a performance evaluation, issues with co-workers, or complaints about your work site or work assignment which do not allege a legal violation. Neither the employee nor the Company has to submit the items listed under this "Claims Not Subject to Arbitration" caption to arbitration under this Program and may seek and obtain relief from a court or the appropriate administrative agency.

#### **REQUIRED NOTICE OF ALL CLAIMS**

When seeking arbitration, the claimant must file the Request for Arbitration form and give written notice of any claim to the other party within one year of the act complained of or within the applicable statute of limitations period, whichever is longer. Subject to any exceptions under applicable law, the day the act complained of occurred shall be counted for purposes of determining the applicable period.

Use the Request for Arbitration form when submitting a claim for arbitration. Identify and describe the nature of all claims asserted and the facts on which your claims are based. Send this written notice by certified or registered mail, return receipt requested. If the Company wishes to invoke Arbitration, it will also complete a Request for Arbitration form identifying and describing the nature of all claims asserted and the facts on which the claims are based and send this written notice to you at the last address recorded in the Company's payroll records.

#### **ARBITRATION PROCEDURES**

You must use the Mediation Step explained in this policy before requesting Arbitration. The agency will administer any Arbitration under the MA's "National Rules for the Resolution of Employment Disputes" and in conformity with this Dispute Resolution Program. Go to ADR.org to obtain a copy of the rules or request a copy from the

Company. The rules in effect on the date a demand is made shall control.

The arbitration will be before a neutral arbitrator who is licensed to practice law and who has significant experience in the employment law area. The arbitration shall apply the substantive law and the laws of remedies, if applicable, of the state in which the claim arose, or federal law or both, depending upon the claims asserted. The decision of the arbitrator shall be in writing and shall provide the reasons for the award unless the parties agree otherwise.

The arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold a pre-hearing conference by telephone or in person, as the arbitrator deems necessary. The arbitrator shall have the authority to rule on a motion to dismiss and/or a motion for summary judgment by any party and, in doing so, must apply the standards governing such motion under the Federal Rules of Civil Procedure.

#### **PRE-HEARING PROCEDURES**

You and the Company each have the right to take the deposition of individuals and expert witnesses designated by another party. Depositions and other pre-trial discovery will be taken in accordance with the order of the arbitrator selected under the Program, who shall allow adequate discovery. You and the Company have the right to subpoena witnesses to the Arbitration in accordance with the Federal Rules of Civil Procedure. At least thirty (30) days before the Arbitration, you and the Company must exchange lists of witnesses, including any experts, and copies of all exhibits to be used at the Arbitration.

#### **ARBITRATION FEES AND COSTS**

There are two types of administrative fees and costs associated with Arbitration; a filing fee with the arbitration agency selected and payment to the arbitrator for his or her services and expenses. Such fees and other expenses shall be allocated as follows:

1. The party requesting Arbitration must pay a \$125.00 filing fee to the agency to request Arbitration. If you request Arbitration the Company will pay the balance of the initial filing fee, and will pay the entire fee if it requests Arbitration.
2. Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of the Arbitration proceedings.
3. Each party shall be responsible for its own attorneys' fees and related litigation expenses, if any; however, if any party prevails on a statutory claim, which allows the prevailing party to be awarded attorneys' fees the arbitrator may award reasonable fees to the prevailing party.
4. Where permitted by law, the arbitrator may assess attorneys' fees against a party upon showing by the other party that the first party's claim is frivolous or unreasonable or factually groundless.
5. If either party pursues a legal claim covered by the Dispute Resolution Program in court or by any means other than Arbitration, the responding party shall be entitled to stay or dismissal of such action, the remand of such action to Arbitration, and the recovery of all costs and attorneys fees and expenses related to such action.

#### **MULTI-STATE BUSINESS**

The Company is engaged in transactions involving interstate commerce and your employment involves such commerce; therefore, the parties agree that the Federal Arbitration Act shall govern the interpretation, enforcement and proceedings under the Dispute Resolution Program.

#### **PROGRAM PROVISIONS/ENFORCEMENT**



The provisions of the Program document are severable and, should any provision be held unenforceable, all others will remain valid and binding. No provision of the Program document will be held unenforceable if such provision can be reasonably interpreted in a manner that results in such provision being enforceable. The arbitrators, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, arbitrability, applicability, enforceability or formation of the agreement to arbitrate including, but not limited to, any claim that all or any part of the agreement to arbitrate is void and voidable.

If a court should determine that Arbitration under this Program is not the exclusive, final, and binding method for the Company and its employees to resolve disputes and/or that the decision and award of the arbitrator is not final and binding as to some or all of a party's claim(s), the party must submit the claim(s) to Arbitration and pursue the Arbitration to conclusion before filing or pursuing any legal, equitable, or other legal proceeding for any eligible claim in a court of competent jurisdiction.

#### **PROGRAM STEPS**

While we encourage you to use all of the steps in the Program in the order outlined, we realize that in some cases it may not be appropriate to use the preliminary steps. Accordingly, if your claim involves a legal claim that is subject to Arbitration hereunder, you may proceed directly to Step 3, Mediation, without first using Step 1, Open Door Policy or Step 2, Executive Review. The Company may skip Steps 1 and 2 if a legal claim is involved.

#### **NOT AN EMPLOYMENT CONTRACT/EXCLUSIVE REMEDY**

While this Program constitutes a binding promise between you and the Company to resolve all disputes pursuant to the process outlined herein, this Program is not and shall not be construed to create any contract of employment, expressed or implied. Nor does this Program in any way alter the "at will" status of any employment. This Program will prevent you from filing a lawsuit in Court for individual, class, or collective relief for a legal claim subject to arbitration.

#### **Analysis**

The issue herein is whether the Respondent's Dispute Resolution Program ("Program") violates Section 8(a)(1) of the Act. In support of this allegation, Counsel for the General Counsel cites *D.R. Horton*, 357 NLRB No. 184 (2012), where the Board found a similar policy to violate Section 8(a)(1) of the Act. However, whereas *Horton* precluded employees from filing joint, class or collective claims against the employer addressing wages and other compensation, breach of contract claims, tort claims, wrongful termination claims, sexual or other illegal harassment or discrimination claims, or other claims specified therein, the Program herein specifically provides that it does not prohibit employees from filing workers compensation claims, unemployment insurance claims, or claims before the Board, any state or federal department of labor, or the United States Equal Employment Opportunity Commission. However, unlike some recent cases, the Program does not contain an "opt out" provision wherein employees have the right to refuse to participate in the Program by executing an agreement, in a timely manner, setting forth their decision to refuse to participate.

Counsel for the General Counsel, in his Statement of Position, states that the Board applies the test set forth in *Lutheran Heritage Village- Livonia*, 343 NLRB 646 (2004), *i.e.*, whether the rule *explicitly* restricts Section 7 activity or, even if it doesn't, whether employees would reasonably believe that it did, and the instant rule explicitly requires that all legal claims of

the employees must be submitted to arbitration, and "...on an individual basis and not as a class or collective action." Because these provisions require employees to waive their Section 7 rights to bring class or collective claims in any forum against the Respondent, Counsel for the General  
 5 Counsel argues that the Program's restrictions violate Section 8(a)(1) of the Act. The fact that the Program specifically provides that the employees do not waive their rights to bring actions before the Board or other governmental agencies does not change this result, citing *Horton*, (at Slip Opinion p. 6) which states: "if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able  
 10 to engage in *other* concerted activities."

Counsel for the Respondent, in her Statement of Position, states that there is no substantive right to class, collective or representative arbitration procedures created by laws other than the Act, and that this matter can be distinguished from *Horton* as it explicitly permits  
 15 employees to file claims with the Board, departments of labor, or the EEOC; therefore the Program does require employees to "waive the right to maintain class or collective actions in **all** forums." She further states that *Horton* "has been discredited by every citable court decision in which it has been considered," and should be here, as well. Therefore, she argues, the Complaint should be dismissed.

In *Horton*, the Board found the arbitration provision unlawful because it "clearly and expressly bars employees from exercising substantive rights that have long been protected by Section 7 of the NLRB." The Board did not say that the required arbitration provision violated the Act only because it barred employees from exercising their Section 7 rights of filing charges with  
 25 the Board to enforce those rights. The Board clearly was saying that Section 7 rights include the right to collectively bring court and arbitral actions. Therefore, it is clear to me that the restriction contained in the Program are unlawful even with the proviso that employees maintain their right to file charges with the Board and other governmental agencies. Further, while I agree with counsel for the Respondent that the courts have "discredited" the Board's *Horton* decisions, I  
 30 am bound by that decision.

Counsel for the Respondent, in her brief, makes a number of arguments to establish that *Horton* was decided incorrectly in addition to arguing that this matter can be differentiated from Horton because it permits access to the Board. She argues that the Complaint contravenes the  
 35 Federal Arbitration Act and that class or collective court or arbitral actions are not necessarily concerted unless the other employees affirmatively consented to, or joined with, the complaining party. She further argues that even if the Program prohibits employees from filing class or collective actions, it does not limit arbitrator's ability to consolidate claims or issue collective relief. However, the Board decided *Horton* and unless and until it determines that Horton was  
 40 incorrectly decided, or the Supreme Court so decides, I am bound by that decision. I therefore find that the Respondent's Dispute Resolution Program violates Section 8(a)(1) of the Act.

### Conclusions of Law

45 1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Dispute Resolution Program maintained by the Respondent violates Section 8(a)(1) of the Act.  
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### The Remedy

Having found that the Respondent has violated the Act by maintaining the Dispute Resolution Program, I recommend that Respondent be ordered to cease and desist from enforcing this policy, and to post the Board Notice set forth below at each of its locations where the Dispute Resolution Program is in effect. Further, I recommend that Respondent be ordered to notify all arbitral and judicial panels where it has attempted to enjoin, or otherwise prohibit, employees from bringing or participating in class or collective actions, that it withdrawing these objections and that it no longer objects to such employee actions.

Upon the foregoing findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended<sup>2</sup>

### ORDER

The Respondent, Apple American Group LLC Applebees, d/b/a Applebees Neighborhood Grill and Bar, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Maintaining or enforcing its Dispute Resolution Program.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify all employees at locations where the Program is in effect, that it will no longer maintain or enforce the provisions contained in the Dispute Resolution Program referred to in the employee handbook that prohibits employees from bringing or participating in class or collective actions in an arbitral or judicial forum relating to wages, hours or terms and conditions of employment.

(b) Notify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions.

(c) Within 14 days after service by the Region, post at each of its facilities where the Dispute Resolution Policy is maintained or enforced, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the

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<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**Dated, Washington, D.C. September 30, 2013**

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**Joel P. Biblowitz**  
**Administrative Law Judge**

**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

**WE WILL NOT** maintain or enforce the Dispute Resolution Program referred to in the Employees' Handbook as far as it prohibits you from bringing or participating in class or collective actions relating to your wages, hours or terms and conditions of employment in arbitrations or court actions and **WE WILL** delete these provisions from our Employee Handbook.

**WE WILL NOT** in any like or related manner interfere with, restrain or coerce you in the exercise of your exercise of rights guaranteed you by law.

**WE WILL** notify any arbitral or judicial panel where we have attempted to prevent or enjoin you from commencing, or participating in, joint or class actions relating to wages, hours or other terms and conditions of employment that we are withdrawing our objections to these actions, and **WE WILL** no longer object to you bringing or participating in such class or collective actions.

**APPLE AMERICAN GROUP LLC APPLEBEES d/b/a APPLEBEES NEIGHBORHOOD GRILL AND BAR**  
**(Employer)**

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

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330 South Second Avenue, Towle Building, Suite 790  
Minneapolis, Minnesota 55401-2221  
Hours: 8 a.m. to 4:30 p.m.  
612-348-1757.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 612-348-1770.